

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES DURIO)	
Claimant)	
)	
VS.)	
)	
ISAAC HAY LLC)	
Uninsured Respondent)	Docket No. 1,035,545
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund (Fund) requests review of the October 12, 2007 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

The ALJ concluded claimant established that “[t]he relationship of employer/employee existed on June 12, 2007, the date of the accident, between claimant and respondent. The claimant was an employee and was not an independent contractor” nor was claimant self-employed.¹

The Fund has appealed this decision alleging that claimant failed to meet his burden of proof that he was an employee rather than an independent contractor based upon the rationale expressed in *McCubbin*.² The Fund requests that the Board reverse the ALJ’s findings and deny claimant compensation.

¹ ALJ Order (Oct. 12, 2007) at 1. The ALJ went on to make other findings but those are not the subject of this appeal. Only claimant’s status as an employee versus an independent contractor is at issue for purposes of this appeal.

² *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

Claimant maintains the ALJ's Order should be affirmed as the evidence supports her finding that he was an employee of respondent's trucking company.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

The facts are well known to the parties and are not in dispute (as evidenced by their briefs). Accordingly, they will not be unnecessarily repeated herein. It is merely the ultimate legal conclusion that is contested.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³ The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁶

It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the

³ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 2006 Supp. 44-501(a).

⁶ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.⁷

When considering whether a truck driver is an employee or independent contractor, the Kansas Supreme Court has held the employer's right to control is an important element in determining what makes an employee or an independent contractor.⁸ In addition to the right to control and the corresponding right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

1. The existence of a contract to perform a certain piece of work at a fixed price;
2. The independent nature of the worker's business or distinct calling;
3. The employment of assistants and the right to supervise their activities;
4. The worker's obligation to furnish tools, supplies and materials;
5. The worker's right to control the progress of the work;
6. The length of time that the worker is employed;
7. Whether the worker is paid by time or by the job; and
8. Whether the work is part of the regular business of the employer.⁹

There is no absolute rule for determining whether an individual is an independent contractor or an employee.¹⁰

The primary test used by courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference

⁷ K.S.A. 44-501(g).

⁸ *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

⁹ *McCubbin*, 256 Kan. 276.

¹⁰ *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.¹¹

Here, claimant drove a truck for respondent's company, a trucking business that hauled a variety of materials, including hay for one of respondent's related companies. He had no interest in the truck, the trailer or the load, other than the fact that his pay represented a percentage of the respondent's payment for the load. He was not compelled to work exclusively for respondent but in reality, he accepted no other work, driving solely for respondent on a variety of routes, depending on the load. Respondent provided claimant with a tractor/trailer to drive and then directed claimant where to pick up a load and when and where to deliver the load. Claimant was given a credit card for expenses associated with driving the load although personal expenses were deducted from his pay.

These loads were arranged by respondent or respondent's broker and often times after dropping off an initial load, he was directed *by respondent's dispatcher* to pick up another load of materials for the return trip. Claimant had no responsibility for negotiating the loads or the prices paid. He was merely paid to drive the truck, delivering the goods as directed by respondent.

The ALJ considered this evidence and concluded that claimant was an employee and was not an independent contractor. This Board Member agrees. While it is true that respondent may not have exhibited as much control as it could have, nonetheless, respondent controlled *what* claimant hauled, *where* he delivered the load, *when* it was to be delivered, and the amount charged to the customer. Respondent, at times, even arranged for a return load thereby maximizing its mileage for the load. Clearly it was respondent's business to haul merchandise from point to point on one of its trucks. Claimant's role in that endeavor was integral. He brought nothing to the job other than his skills as a truck driver. Everything else was provided by respondent. Under these facts and circumstances, this Board Member finds the claimant is an employee. The ALJ's preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹² Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

¹¹ *Id.* at 102-103.

¹² K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 12, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2007.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Eric K. Kuhn, Attorney for Uninsured Respondent
Thomas D. Arnhold, Attorney for the Fund
Nelsonna Potts Barnes, Administrative Law Judge